

L5EKNAVC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

20 CR 160 (MKV)  
Remote Conference

6 JORGE NAVARRO, ERICA GARCIA,  
7 MARCOS ZULUETA, MICHAEL  
TANNUZZO, SETH FISHMAN, LISA  
GIANNELLI, JORDAN FISHMAN,  
RICK DANE, MICHAEL KEGLEY,  
JR., ALEXANDER CHAN, REBECCA  
8 LINKE,

9 Defendants.

10 -----x  
11 New York, N.Y.  
12 May 14, 2021  
13 11:10 a.m.

14 Before:

15 HON. MARY KAY VYSKOCIL,

16 District Judge

17 APPEARANCES

18 AUDREY STRAUSS,  
United States Attorney for the  
Southern District of New York  
19 ANDREW C. ADAMS  
SARAH MORTAZAVI  
Assistant United States Attorneys

20 JASON W. KREISS  
Attorney for Defendant Navarro

21 DEBORAH AUSTERN COLSON  
Attorney for Defendant Garcia

22 ROBERT E. GOLDMAN  
Attorney for Defendant Zulueta

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## 1 APPEARANCES (Continued)

2 DONALD T. ROLLOCK  
3 Attorney for Defendant Tannuzzo4 ANDREW SIMMONS FELDMAN  
5 Attorney for Defendant S. Fishman6 LOUIS V. FASULO  
7 ALEX STEPHEN HUOT  
8 Attorneys for Defendant Giannelli9 PATRICK JAMES JOYCE  
10 Attorney for Defendant J. Fishman11 CALVIN HAROLD SCHOLAR  
12 Attorney for Defendant Dane13 PAGE ANTHONY PATE  
14 Attorney for Defendant Oakes15 RITA GLAVIN  
16 MICHAEL G. CONSIDINE  
17 Attorneys for Defendant Servis18 STEPHEN P. SCARING  
19 Attorney for Defendant Rhein20 MICHAEL ROMANO MAZZOLI  
21 Attorney for Defendant Kegley22 DAVID PATTON  
23 FEDERAL DEFENDERS OF NEW YORK  
24 Attorney for Defendant Chan  
25 BY: ROBERT M. BAUMDAVID WIKSTROM  
Attorney for Defendant Linke26 ALSO PRESENT:  
27 EMMA GREENWOOD, Coordinating Discovery Attorney

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(The Court and all parties appearing telephonically)

(Case called)

THE DEPUTY CLERK: Counsel starting with the government, state your appearances, please.

MR. ADAMS: Good morning, your Honor. You have Andrew Adams and Sarah Mortazavi.

THE COURT: Sorry, Mr. Adams, I'm having a hard time hearing you.

MR. ADAMS: I'll speak up, your Honor. You have myself and Sarah Mortazavi for the government. Good morning.

THE COURT: All right. Thank you, sir. Good morning.

THE DEPUTY CLERK: I'm going to go down the list and, by defendant, if counsel will state your appearance and then please let us know if your client is on the line as well.

Jorge Navarro?

MR. KREISS: Good morning, your Honor. Jason Kreiss on behalf of Jorge Navarro. Mr. Navarro is not on the line, and I had sent in a letter seeking his excusal from the hearing, on May 12th.

THE COURT: All right. Good morning, Mr. Kreiss.

THE DEPUTY CLERK: Erica Garcia.

MS. COLSON: Good morning, your Honor. Deborah Colson on behalf of Erica Garcia, and she is not present for this conference and has waived her appearance.

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1                   THE COURT: All right. Good morning, Ms. Colson.  
2 Thank you.

3                   THE DEPUTY CLERK: Marcos Zulueta.

4                   MR. GOLDMAN: Robert Goldman for Mr. Zulueta, who has  
5 waived his presence.

6                   THE COURT: All right. Thank you. And good morning,  
7 Mr. Goldman.

8                   Could I just ask that all parties who are not speaking  
9 to mute their line because there's a tremendous amount of  
10 feedback. And if you are not participating in this hearing but  
11 are simply monitoring it, it would greatly facilitate both my  
12 ability and everybody's ability to hear one another, and the  
13 ability of our court reporter to get an accurate transcript, if  
14 you would please all mute your lines.

15                  I'm sorry, Ms. Dempsey.

16                  THE DEPUTY CLERK: Thank you, your Honor.

17                  Michael Tannuzzo.

18                  MR. ROLLOCK: Good morning, your Honor. Donald  
19 Rollock, appearing on behalf of Mike Tannuzzo, and I did waive  
20 my client's appearance for this application.

21                  THE COURT: All right. Thank you, Mr. Rollock.

22                  THE DEPUTY CLERK: Seth Fishman.

23                  MR. FELDMAN: Good morning, your Honor. Andrew  
24 Feldman on behalf of Dr. Seth Fishman. Dr. Seth Fishman is  
25 present for this hearing and is listening in.

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1                   THE COURT: All right. Thank you, Mr. Feldman. Good  
2 morning.

3                   THE DEPUTY CLERK: Lisa Giannelli.

4                   MR. FASULO: Good morning, Judge. It's Louis Fasulo  
5 for Lisa Giannelli. Ms. Giannelli is on the line this morning  
6 and is present. I think Alex Huot is also present from my  
7 office.

8                   THE COURT: I'm sorry, the other gentleman's name?

9                   MR. FASULO: Alex Huot.

10                  MR. HUOT: Yes, I'm also on the line.

11                  THE COURT: All right. Good morning, Mr. Fasulo and  
12 Mr. Huot. And good morning, Ms. Giannelli.

13                  I neglected to say good morning to Dr. Fishman as  
14 well, so good morning.

15                  THE DEPUTY CLERK: Jordan Fishman.

16                  MR. JOYCE: Good morning, your Honor. Patrick Joyce  
17 on behalf of Mr. Fishman. Mr. Fishman is appearing  
18 telephonically. We did file a request that he be able -- or a  
19 waiver of his in-person appearance.

20                  THE COURT: And do you have a Mr. Moore with you?

21                  MR. JOYCE: Mr. Moore is not present. He's on the  
22 case but he's not present.

23                  THE COURT: All right. So good morning, Mr. Joyce and  
24 Mr. Fishman.

25                  MR. J. FISHMAN: Good morning, your Honor.

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1 THE DEPUTY CLERK: Rick Dane.

2 MR. SCHOLAR: Good morning, your Honor. This is  
3 Calvin Scholar for Mr. Dane. I believe Mr. Dane is also on the  
4 line. I'm having some problems having my computer connect to  
5 the camera, so I apologize for not being visible.

6 THE COURT: All right. Good morning, Mr. Scholar, and  
7 good morning, Mr. Dane.

8 MR. DANE: Good morning, your Honor.

9 THE DEPUTY CLERK: Christopher Oakes.

10 MR. PATE: Good morning, Judge. Page Pate on behalf  
11 of Mr. Oakes. He is not on the call with us today.

12 THE COURT: Good morning, Mr. Pate.

13 THE DEPUTY CLERK: Jason Servis.

14 MS. GLAVIN: Good morning, your Honor. Rita Glavin,  
15 along with Michael Considine, for Mr. Servis, who is not  
16 present with us on the conference and waives his appearance.

17 THE COURT: All right. Good morning, Ms. Glavin. I  
18 was not expecting to see you; I thought you were otherwise  
19 engaged on trial, but good morning to you.

20 MS. GLAVIN: We're off today.

21 THE COURT: All right. Good morning, and good morning  
22 to Mr. Considine as well.

23 MR. CONSIDINE: Good morning, your Honor.

24 THE DEPUTY CLERK: Kristian Rhein.

25 MR. SCARING: Good morning, your Honor. Stephen

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1 Scaring for Kristian Rhein. His appearance has been waived.

2 THE COURT: Good morning, Mr. Scaring. And do you  
3 have a colleague on the line with you?

4 MR. SCARING: No, I don't. Thank you.

5 THE COURT: You're welcome.

6 THE DEPUTY CLERK: Michael Kegley.

7 MR. MAZZOLI: Your Honor, Mike Mazzoli for Mr. Kegley,  
8 and he is also on the line.

9 THE COURT: Good morning, Mr. Mazzoli and Mr. Kegley.

10 THE DEPUTY CLERK: Alexander Chan.

11 MR. BAUM: Good morning, your Honor. Robert Baum on  
12 behalf of Dr. Chan. He is not on the line today.

13 THE COURT: Good morning, Mr. Baum.

14 THE DEPUTY CLERK: And Rebecca Linke?

15 THE COURT: Counsel for Ms. Linke.

16 THE DEPUTY CLERK: Mr. Wikstrom?

17 MR. WIKSTROM: I apologize, your Honor, I muted  
18 myself. This is David Wikstrom, and Dr. Linke is present as  
19 well.

20 THE COURT: All right. Thank you. Good morning,  
21 Mr. Wikstrom, and good morning, Dr. Linke.

22 Any other appearances?

23 MS. GREENWOOD: Yes, your Honor. Emma Greenwood, the  
24 coordinating discovery attorney, is here.

25 THE COURT: Thank you, Ms. Greenwood, very much.

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1               Anyone else?

2               All right. So, needless to say, we are conducting  
3 today's proceeding remotely because of restrictions that remain  
4 in place as a result of COVID-19. I did receive a written  
5 request from the parties to conduct today's hearing remotely  
6 rather than in person at the courthouse, and so I am honoring  
7 that request.

8               We are here for a status conference in this case,  
9 which was scheduled when we were last together, back in  
10 November. I would note for the record that under Rule 43(b),  
11 the presence of the defendant is not required at a conference  
12 in a case. There are numerous cases holding that defendants do  
13 not need to attend conferences, so, notwithstanding that, I  
14 have received, as some of the counsel have noted when we were  
15 taking appearances, I have received written waivers of presence  
16 and consents to proceed by videoconference from most, if not  
17 all, of the parties.

18              I would just like to give you a few reminders before  
19 we get going.

20              Because we're proceeding remotely, as I said at the  
21 outset, please mute your lines if you're not addressing the  
22 Court. The sound has gotten much better but I was getting a  
23 great deal of feedback.

24              We do have a court reporter on the line with us.  
25 Mr. Walker, are you able to hear me and all of the parties

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1 clearly?

2 (Pause)

3 THE COURT: All right. Thank you, Mr. Walker.

4 So when you do speak, please identify yourself for the  
5 record so that I know who's speaking, so that your video pops  
6 up and I can see who it is that I'm speaking with, and, most  
7 importantly, so that Mr. Walker can get an accurate record of  
8 what transpires today.

9 I would just remind everyone, this is a formal court  
10 proceeding, as if you were all in open court, and you are  
11 strictly prohibited from recording or rebroadcasting any  
12 portion of today's proceeding.

13 So, as I said, several defendants have submitted  
14 waivers of presence. I have received requests or waivers from  
15 the following defendants: Alexander Chan – and I would just  
16 ask counsel to please listen and correct me if I forget someone  
17 or if what I recite is inaccurate – Alexander Chan filed a  
18 waiver at ECF No. 64, Kristian Rhein filed at ECF 365, Erica  
19 Garcia filed at 366 – someone needs to mute their line, please  
20 – Michael Tannuzzo filed a waiver at 367, Marcos Zulueta at  
21 369, Jorge Navarro at ECF 370, and Jason Servis at ECF 371.

22 Are there any additional requests for waiver of  
23 appearance?

24 All right. As I noted, defendants' appearance is not  
25 required, but having said that, I will endorse or grant each of

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1 these requests by the defendants for waiver of their appearance  
2 at today's conference.

3 I've also received written confirmations from the  
4 following defendants to proceeding remotely by videoconference  
5 today: Jordan Fishman at ECF 359 -- is that accurate, counsel?

6 MR. JOYCE: Yes, your Honor.

7 THE COURT: All right. I would note that what was  
8 filed on the docket is not signed by the defendant. I believe  
9 you told me Mr. Fishman is on the line, correct?

10 MR. JOYCE: He is, your Honor. And under his  
11 signature there is a parentheses that says the Court would  
12 inquire and sign on his behalf.

13 THE COURT: Yes, so that's what I intend to do.

14 Mr. Fishman, do you in fact consent to proceeding  
15 today by videoconference rather than appearing before me in  
16 open court.

17 MR. J. FISHMAN: Yes, I do. Thank you, your Honor.

18 THE COURT: All right. Thank you.

19 I have a consent from the following defendants as  
20 well: Michael Kegley at 360, Jason Servis at 361, Rick Dane at  
21 ECF 362, Dr. Linke at ECF 363, Marcus Zulueta at 369, Dr. Seth  
22 Fishman at 373.

23 I then have two consents that were not filed on the  
24 docket from Lisa Giannelli and Kristian Rhein. I would ask  
25 counsel for those defendants to please file those consents on

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1 the docket in the case.

2                   Am I missing any other defendants who have filed a  
3 written consent to proceed by videoconference?

4                   All right. I have not done a check that I have  
5 something from every defendant, so I will give a final  
6 opportunity for anyone who wishes to object to proceeding by  
7 videoconference, to do so now.

8                   All right. Hearing none, we will proceed with this  
9 conference by video.

10                  Now, as I said, at the last conference, it was agreed  
11 that discovery would be ongoing and that we would reconvene  
12 today for a further status conference, at which we would talk  
13 about things like trial scheduling. In the interim, three  
14 defendants filed motions to dismiss, on which the Court was  
15 diligently at work and close to issuing a ruling. Then, more  
16 than 14 months into this case, and after defendants had filed,  
17 as I say, hundreds of pages in support of their motion to  
18 dismiss the criminal indictment against them, motions which  
19 were fully briefed in April and on which the Court has been  
20 diligently working since that time, last week, defendants filed  
21 a letter advising the Court that they were, quote, considering  
22 moving to recuse me from presiding over this case.

23                  Yesterday afternoon, after consultation with, and over  
24 objection by, the government, defendants filed a letter asking  
25 me to recuse myself from this case, over which I have presided

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1 fairly for more than a year and a half. All of the information  
2 upon which defendants rely has been publicly available since  
3 the case was assigned to me. This meritless motion appears to  
4 be calculated to divert attention from the serious crimes with  
5 which the defendants have been accused, and to obstruct and  
6 delay the orderly administration of the case.

7 The motion is denied as frivolous, an obvious tactical  
8 gambit to delay the determination of defendants' motion to  
9 dismiss.

10 No reasonable person would, or could, believe that I  
11 cannot preside fairly and impartially over this case based upon  
12 my ownership, my past ownership, of incidental fractional,  
13 financially negligible, interest in two horses whose offspring  
14 – offspring which I did not own – apparently ran in four races  
15 against horses trained by Defendants Servis or Navarro some 15  
16 years ago, which is a decade or more before the alleged  
17 conspiracy involving Messrs. Servis or Navarro is alleged to  
18 have begun.

19 The opposition, filed late last night by the  
20 government, puts the lie to concocted charges by defendant that  
21 I had a potential financial interest in the outcome of four  
22 races that took place in 2006, 2007, 2008, and 2009, in which  
23 Defendants Servis- and Navarro-trained horses supposedly ran.

24 First, defendants argue that I should recuse myself  
25 because I was a breeder of horses that raced against horses

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1 trained by Navarro or Servis, as I say, in four races from 2006  
2 to 2009. Defendants' motion initially states that I, quote,  
3 bred these horses, but then it misleadingly characterizes them  
4 as, quote, my horses. Defense counsel and their clients well  
5 know, or they should, that breeding horses and owning horses is  
6 not the same thing. I held a fractional interest in two horses  
7 whose offspring, which I did not own, then raced, apparently on  
8 four occasions – one horse raced three times, the other horse  
9 raced once – against horses trained by either Mr. Navarro or  
10 Mr. Servis.

11 As defendants surely must know, based on their  
12 experience in the industry, my fractional interest in these  
13 horses, which, at best, would have provided inconsequential  
14 income to me in the form of breeders' awards, if the horses had  
15 run in New York, which they apparently did not, these  
16 fractional, negligible potential interests from nearly 13 to 15  
17 years ago are precisely the remote interests that the Second  
18 Circuit has stated clearly is not sufficient grounds for  
19 recusal, and I would refer you to the *Drexel Burnham* case.

20 Defendants also suggest that somehow I could be a,  
21 quote, victim of the wrongdoing alleged in the indictment. But  
22 as defendants readily admit, the indictment does not allege any  
23 criminal wrongdoing by Mr. Navarro or Mr. Servis before 2016,  
24 which is long after the races to which they attach significance  
25 in their motions.

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1                 Now, unless counsel wishes to make an admission that  
2 your clients were doping horses ten years before the conspiracy  
3 alleged in the indictment, the races referred to in the  
4 intentionally misleading letter submitted in support of the  
5 recusal motion have nothing to do with this case. There is no  
6 conflict here, and no reasonable person would perceive one.

7                 Anyone who thinks this is a serious motion should  
8 consider that one of the alleged bases for the recusal motion  
9 is that one of my more than 150 or so former partners at my  
10 former law firm, from which I retired in 2016, did pro bono  
11 work, work in which I had absolutely no involvement, for a  
12 nonprofit organization that cared for old, infirmed, retired  
13 racehorses. This nonprofit organization has no discernible  
14 connection to the issues in this case and does not in any way  
15 call into question my fairness or impartiality. The bad-faith  
16 motion is frivolous and was clearly calculated to generate  
17 diversionary press coverage, which it clearly already has.

18                 Now, while I carefully considered each of defendants'  
19 arguments, I need not respond to each of the concocted claims  
20 made in the motion. I will note, however, that the motion  
21 contains multiple plainly false statements, which officers of  
22 the Court should not have made in a public filing and which are  
23 not entitled to be dignified with point-by-point commentary,  
24 but, by way of example only:

25                 I did not own the two horses from the 2006 to 2009

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1 races that defendants misleadingly referenced as my horses.

2 Another blatant falsehood: My former partner, alluded  
3 to throughout the motion, is not on the board of the New York  
4 Racing Association and has not been on the NYRA board for many  
5 years, as he's performing public service for the State of New  
6 York and, therefore, resigned from the NYRA board in 2015.

7 In all events, it's black-letter law that the nonlegal  
8 activities of one of my former partners is in no way relevant  
9 to the issues of whether I can fairly and impartially conduct  
10 this case to conclusion.

11 Another example of falsehood in the motion: It is  
12 patently false to suggest that I had a financial interest in  
13 horses racing at Monmouth or Tampa Downs, since the very  
14 regulations defendants themselves cite to in their motion make  
15 it clear that the breeders' awards they rely on only apply to  
16 races in New York.

17 Another of the clearly meritless arguments for recusal  
18 is that for a period of time, that ended in 2015, I was a  
19 member of a breeding organization, the New York Thoroughbred  
20 Breeders.

21 Another, even more attenuated, even more frivolous,  
22 argument is that my relationship with a person involved in  
23 aspects of the thoroughbred industry is somehow disqualifying.  
24 Under black-letter law, those affiliations are irrelevant and  
25 obviously not the grounds for recusal.

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1                  Every court to consider similar contentions has  
2 summarily rejected them, and I would refer you to: *McNeil v.*  
3 *Aguilos*, a 1995 case from the Southern District of New York;  
4 *United States v. Nelson*, 2010, from the Eastern District of  
5 New York; *Sevier v. Hickenlooper* from the District of Colorado  
6 in 2018; *Sierra Club v. Simkins* from the Fourth Circuit 1988;  
7 and *Armenian Assembly* from the D.C. Circuit, 2011.

8                  No authority suggests that an attenuated or past  
9 connection to a nonparty organization requires recusal, even  
10 where issues arise on which the organization takes positions.  
11 To my knowledge, no organization to which I have ever belonged  
12 has taken a position on any issue in this case. I have been  
13 presiding over this case for more than 14 months, during which  
14 time I've held numerous hearings, ruled on motions, and managed  
15 the case with a view towards moving it towards a reasonably  
16 expeditious trial despite COVID restrictions, requests for a  
17 protracted schedule, and several requests for adjournments. I  
18 have an affirmative duty to keep this case and to move it  
19 forward in the regular course, and I intend to do just that.

20                  To that end, prior to receipt of the letter of last  
21 Thursday advising that defendants were contemplating making a  
22 motion for me to recuse, I was carefully reviewing the  
23 voluminous submissions of the parties on the pending motions to  
24 dismiss, including literally hundreds of pages of briefings,  
25 affidavits, and documents submitted in connection with the

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1 motions by certain, but not all, defendants. Those motions are  
2 all denied.

3 Next week I will be issuing a formal opinion setting  
4 forth the bases for my decision to deny the motions to dismiss,  
5 and after this conference concludes I'll file on the docket a  
6 written order reflecting my ruling on the recusal motions.

7 Now, I'd like to turn to the status conference, which  
8 is the reason we were scheduled to convene today.

9 Can I please have from the government an update on the  
10 status of discovery?

11 MR. ADAMS: Yes, your Honor. Hi. This is Andrew  
12 Adams, speaking for the government.

13 Your Honor, discovery has been largely complete. Most  
14 recently, the government has been gathering documents obtained  
15 in connection with another one of the cases involving the  
16 horseracing industry, U.S. v. Robinson, which is before Judge  
17 Oetken. In connection with gathering those documents, we  
18 have -- as we have been doing throughout the proceeding, we are  
19 cross-producing those to defendants in this case as well,  
20 largely in an abundance of caution, but with some indication  
21 that there is some overlap between the companies that were  
22 producing drugs that are at the heart of the Robinson case and  
23 certain of the defendants in this case.

24 So, recently and upcoming, we expect that we will be  
25 making productions of largely grand jury subpoena returns and

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1 material from that case to the defendants. The volume on that  
2 is not voluminous, and we're happy to talk about how that plays  
3 into this case with defense counsel and give people some  
4 guidance on who may be specifically impacted by this  
5 production.

6 THE COURT: All right. Other than that, Mr. Adams, is  
7 discovery complete? We're getting to the point where discovery  
8 needs to be brought to a close. This case needs to move  
9 towards trial.

10 MR. ADAMS: Agreed, your Honor. And discovery is --  
11 what we had gathered and what we have gathered, we've produced.  
12 These are things that we are continuing to receive as we  
13 continue to investigate.

14 THE COURT: All right.

15 Ms. Greenwood, is there anything you want to put on  
16 the record? I do have your last status report, which came in  
17 on April 30th. You reported to me that there was a  
18 supplemental production in April. I don't know the volume of  
19 that. So, Ms. Greenwood?

20 MS. GREENWOOD: Yes, your Honor. For the April  
21 production, the volume was just about eight gigabytes, and to  
22 put that in context, we have in this case over eight terabytes  
23 of data, so it was, in the scheme of things, a rather small  
24 production.

25 I would like to note for the record that since the

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1 last conference, there have been eight productions of global  
2 discovery, two of which were rather large and were actually  
3 replacements for earlier productions of discovery that I think  
4 were discussed at length at the last conference.

5 THE COURT: Right. I think you had raised with me  
6 some issues with respect to that discovery, right?

7 MS. GREENWOOD: Yes, your Honor.

8 And I can report that there are no remaining technical  
9 issues with any of the global discovery that my office has  
10 received, and all productions have been made available to  
11 defense counsel.

12 THE COURT: All right.

13 Do any defendants wish to put anything on the record  
14 with respect to discovery?

15 All right. As I say, I will be issuing --

16 MS. GLAVIN: Your Honor, I believe Mr. Baum was  
17 speaking. I think he had to go off mute.

18 This is Rita Glavin, for the record.

19 MR. BAUM: I apologize.

20 THE COURT: No problem. If this happens, maybe people  
21 should raise their hand, too, because I can see that visually.  
22 I don't see when your mouth is moving.

23 MR. BAUM: I forgot to --

24 THE COURT: Go ahead, Mr. Baum.

25 MR. BAUM: -- unmute following your question.

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1                   THE COURT: No problem.

2                   MR. BAUM: Your Honor, I've been asked to speak on  
3 behalf of the defense in relation to the discovery and its  
4 impact on the motion schedule that was previously set by the  
5 Court.

6                   THE COURT: Yes.

7                   MR. BAUM: In the May 7th letter to the Court by the  
8 government, which was based on discussions between the parties,  
9 the government consented to an extension of time for the filing  
10 of motions to August 27th. In that letter, they described the  
11 reasons as trial conflicts – for one, Ms. Glavin, as well as  
12 one or two other defense attorneys – and also the opportunity  
13 to continue to review discovery. I can tell the Court that it  
14 is important for the discovery to be completed before we file  
15 our motions, particularly the motions directed to the wiretaps.  
16 And there are numerous reasons for that.

17                  A wiretap application must show that the government or  
18 the agent has exhausted all other remedies other than wiretaps.  
19 And unless we review the discovery that currently exists,  
20 which, as Ms. Greenwood noted, is voluminous, and we are  
21 struggling to complete it, we are not in a position to be able  
22 to effectively address the suppression issue involving that.

23                  The wiretaps also must demonstrate that government  
24 investigative techniques -- other government investigative  
25 techniques have failed. We can't address that unless we

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1 complete the discovery.

2 There are also statements in the wiretap applications  
3 which we believe may not be accurate. We cannot address that  
4 until we complete the discovery.

5 So, it's important, and I believe common in the  
6 Southern District, for the Court to allow discovery to be  
7 completed before the defense files motions, and in this  
8 particular case relating to the wiretaps, I've provided the  
9 Court with several reasons why it's important to complete the  
10 discovery.

11 I will add, as Mr. Adams has told you, that there is  
12 discovery that is going to be produced. In addition to the  
13 Robinson case, which will be produced, it's my understanding  
14 that there's material discovery from grand jury subpoenas which  
15 will be produced.

16 So, these are factors which lead us to request an  
17 extension of the time to file the wiretap motions, and we  
18 respectfully ask your Honor's indulgence in allowing us to  
19 complete our discovery.

20 I might add – and I'm glad Ms. Greenwood is on the  
21 line – I might add that it's my understanding, based on  
22 Ms. Greenwood's letter to the Court just two weeks ago, that,  
23 in addition, Ms. Greenwood and her team are developing a --

24 THE COURT: Let me just interrupt you because  
25 Ms. Greenwood asked that that letter be filed under seal. So

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1 I'm just going to remind you --

2 MR. BAUM: Yes.

3 THE COURT: -- to be careful that you are not  
4 disclosing privileged communications that she had with  
5 defendants.

6 MR. BAUM: I totally understand, and I appreciate your  
7 bringing that to my attention, Judge.

8 The only thing I want to say is that Ms. Greenwood's  
9 developing a tool for reviewing the call sheets and the  
10 wiretaps. It would be an online database to be used for  
11 documents and emails. And that tool has not been completed  
12 yet, to my understanding, and she's working with the vendor to  
13 complete that.

14 So, for all of these reasons, we ask you to allow us  
15 to complete a review of the discovery that has currently been  
16 provided and to complete discovery generally before we're asked  
17 to file wiretap suppression motions, which would require our  
18 attention to this discovery.

19 THE COURT: Anyone else wish to be heard?

20 All right. The Court -- go ahead, Mr. Adams.

21 MR. ADAMS: I'm sorry, your Honor. I was going to ask  
22 if I could just respond to that.

23 Discovery that's going out -- that has gone out  
24 recently and is going out is almost certainly not going to have  
25 any impact on consideration of the wiretaps. Of course, I

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1 think it's been my experience that often the Court will say  
2 we're going to set a motion deadline, and if there is discovery  
3 from ongoing investigations that provides a new ground for a  
4 motion after that deadline, then you can refile new motions.  
5 But I don't expect that there's any real material impact on the  
6 motions that could be considered based on what we're planning  
7 to produce.

8 THE COURT: All right.

9 MR. BAUM: Your Honor, with all due respect to  
10 Mr. Adams, he advised us that there's material discovery from  
11 grand jury subpoenas, so he might not even be aware of the  
12 things he receives pursuant to those subpoenas and how they may  
13 impact on our filing of motions.

14 THE COURT: All right. I understand.

15 The Court does have the letter that I guess was  
16 submitted by the government with a proposal asking me to modify  
17 the schedule that we talked about at the last conference for  
18 these phase two motions, which is the shorthand that we're  
19 using to refer to motions to suppress. The proposed new  
20 briefing schedule is way, way too extended, and would push a  
21 trial in this case well into 2022, and that's just not  
22 acceptable to the Court. I am willing to adjourn the schedule  
23 briefly, but any scheduling that needs to be done -- first of  
24 all, I do note that the government has represented that the  
25 bulk of the materials in this case have been produced. I will

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1 extend the schedule slightly, and I will also say, in that  
2 order, that if there is discovery material subsequently  
3 produced that is properly the subject of a motion, I will  
4 entertain that motion outside the schedule that I'm about to  
5 set, but I am not going to enter a schedule that pushes  
6 briefing so that briefing is not even completed until right  
7 before Thanksgiving. That's just not acceptable.

8 So, phase two motions will be due on June 15th,  
9 oppositions will be due August 2nd, and replies will be due  
10 September 1st. And, as I say, if there is discovery produced  
11 subsequently of which the defendants were not aware, which is  
12 properly subject to a motion to dismiss, I will certainly  
13 entertain that motion out of turn of this schedule while we are  
14 moving forward with the other issues that we need to talk  
15 about.

16 MS. GLAVIN: Your Honor, I think you may have meant  
17 July 15th?

18 THE COURT: No. I meant June 15th.

19 MS. GLAVIN: The current schedule for phase two  
20 motions, I believe, is that the defense was to file on  
21 June 28th.

22 THE COURT: I thought it was May 24th.

23 MS. GLAVIN: No. We had asked for -- there was a  
24 letter that we filed, that the Court memo-endorsed on March --

25 THE COURT: Your letter?

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1 MS. GLAVIN: Yes, your Honor.

2 -- asking for June 28th.

3 THE COURT: All right. I will make it July 15th in  
4 light of that, and then the oppositions will have to be due --  
5 let me just pull out a calendar.

6 I'm sorry, I'm still working off of the May 24th date.

7 August 19th for oppositions, and September 9th for any  
8 reply.

9 As I say, if materials are produced -- I understand  
10 your point, Mr. Baum, and it's well taken, but if the  
11 government produces additional material, you can simply advise  
12 the Court that that's come in and that you have a motion that  
13 you'd like to make, and I will set a schedule in connection  
14 with that. All right?

15 MR. BAUM: Thank you, your Honor.

16 THE COURT: Now, the next thing we should talk about  
17 is the question of expert disclosure.

18 The government is proposing, apparently, that that  
19 happen, disclosure of proposed experts, at the end of the  
20 briefing schedule it was proposing, which was November. I've  
21 just now moved that up to September 9th. As I understand it,  
22 defense counsel want to talk about this at another conference,  
23 which you'd like me to hold sometime in the fall. I certainly  
24 will hold another conference in the fall, but I do not see why  
25 disclosure of experts cannot proceed while you are reviewing

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1 whatever discovery you're reviewing and working on motions to  
2 suppress. I'll hear from anyone who wishes to be heard.

3 Go ahead, Ms. Glavin.

4 MS. GLAVIN: Your Honor, with respect to expert  
5 disclosure, I don't think that the -- correct me if I am wrong  
6 on this, your Honor, I don't think the Court is aware of what  
7 the government has made disclosures to us on experts.

8 THE COURT: I know they told me that they've told you  
9 of two experts. That's all they've advised the Court.

10 MS. GLAVIN: With respect to one of the two experts --  
11 and I would call this expert -- her name is Dr. Cole. With  
12 respect to the expert reports we received from the government  
13 in September, I think there were approximately --

14 THE COURT: I'm sorry, you have both reports and the  
15 names?

16 MS. GLAVIN: Yes. There are two experts. I'm  
17 forgetting the name of the second, but the first expert, which  
18 I assume is the primary expert for the government, is a doctor  
19 by the name of Dr. Cole. And there were approximately --  
20 Mr. Adams can correct me if I am wrong -- there were  
21 approximately seven or eight different scientific opinions that  
22 were given in that disclosure. There was then a second  
23 disclosure in February of this year that also has several  
24 additional scientific opinions. One of the opinions deals with  
25 a number of different substances. We began working with the

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1 consultant on this sometime after September, at least with  
2 respect to (unintelligible). The new report that we received  
3 in February from the government -- and I want to emphasize that  
4 the reports are -- they take up somewhat of a fair amount of  
5 time and may require different expertise, so we have -- I know  
6 as defense lawyers, we've been discussing it as a group, and  
7 part of the issue is, I think, for us is needing to discuss  
8 with the government in terms of their own theories at trial  
9 what -- so we can have a sense of what expert we want to use,  
10 because I think there are three different trial groups, and it  
11 may be that they're not --

12 THE COURT: Yes.

13 MS. GLAVIN: It may be that they're not going to use  
14 one expert or this report for this trial, and that makes things  
15 just sort of a little bit difficult on our end.

16 In addition – and I do want to make this clear to the  
17 Court – the government has raised with us, and I know your  
18 Honor's aware of this from our November conference, but there  
19 is a superseding indictment possibility. Mr. Adams, we  
20 discussed this with him, and he -- with respect to some groups  
21 of defendants, he has said he does not think there would be new  
22 charges, there could be with others. And while the  
23 government's perspective may be that if they bring a  
24 superseding indictment, it doesn't change anything, well, a  
25 simple word change in the indictment, even if you don't add new

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1 charges, to us - and we are the Count Three or Four  
2 defendants - a simple word change in the indictment can change  
3 what our whole defense theory is and what we think about need  
4 for experts or not.

5 THE COURT: I understand.

6 MS. GLAVIN: That's what's causing the issue on our  
7 end. So it's not a desire by our end to try and put this off.  
8 We just want to get it right, and we don't want to have to  
9 expend money on our end for something we may change our mind on  
10 and not need. That's what makes it hard.

11 THE COURT: I understand. I also appreciate full well  
12 that experts, and even the consultants that you need to get you  
13 to experts, are expensive.

14 On my list of things I wanted to talk about, in fact  
15 the next thing, was to raise the subject of trial groupings.  
16 Back before the November conference, at my request, the  
17 government had submitted a letter in which it made suggestions  
18 about breaking the defendants into three groups and proceeding,  
19 in effect, in three separate trial groupings. I don't recall  
20 that the defendants ever responded to that. Was that a joint  
21 proposal, or do defendants wish to be heard on that? Not right  
22 now, but I would set a deadline. Where does that discussion  
23 stand about trial groupings?

24 MS. GLAVIN: Your Honor, I'm happy to address it.

25 THE COURT: Yes.

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1 MS. GLAVIN: I thought, and I may be under the  
2 misimpression, that at our last conference, that we were  
3 putting off the discussion on severance and groups to see how  
4 things developed.

5 THE COURT: Right. That's true, but there were  
6 discussions with the defendants -- with the government in the  
7 meantime.

8 MS. GLAVIN: I can tell, from at least with respect to  
9 my perspective on the Count Three and Four defendants in the  
10 group, I don't have an objection to that group, but I don't  
11 know if things will change with the government. And I also  
12 don't know if things will change with the government if they  
13 supersede and add an additional defendant.

14 THE COURT: All right. Fair enough.

15 Mr. Adams, let me ask you, because it's also on my  
16 list of questions for you: What specifically is the  
17 government's intention with respect to whether there's going to  
18 be another superseding indictment? Will there be new  
19 defendants? Will there be new charges? If there's going to be  
20 a superseding indictment, when is it coming? Because the  
21 defendants have a fair legitimate point that they cannot  
22 realistically be expected to even comment on your proposed  
23 trial groupings, much less retain experts and prepare the case  
24 for trial, unless and until they know what the indictment looks  
25 like.

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1 MR. ADAMS: Thank you, your Honor.

2 As we've discussed with the defendants, to the extent  
3 that we seek to add additional charges against the people who  
4 are in the case right now, those would be charges based on  
5 likely a wire or mail fraud theory that focused squarely on the  
6 same facts that are the subject of the discovery submitted to  
7 date.

8 THE COURT: Excuse me one second, Mr. Adams. Whomever  
9 is typing, please stop doing it and please mute your line.

10 Go ahead, Mr. Adams. I'm sorry.

11 MR. ADAMS: Thank you, your Honor.

12 That is to say, there is no expectation that filing of  
13 a superseding indictment as to the people in this case today  
14 would have any impact on what the discovery or the facts  
15 underlying the case would be. There may be, as a result of the  
16 superseder, if it comes, a motion to dismiss a new count, but  
17 there will not suddenly be a new wiretap application that  
18 becomes relevant or a new search warrant that becomes relevant.

19 With respect to new people who may or may not be  
20 added, as I've said all along, the government continues to  
21 investigate this case and to investigate other related cases.  
22 There may well be other people who are charged; they may be  
23 coconspirators in this case. The government would not expect  
24 that somebody being added to the case today would be on the  
25 same schedule as the people who have been in the case, but

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1       that, again, would have no impact on the defendants who are  
2       currently in the case. We wouldn't be seeking to join for  
3       trial a defendant who arrived in the case tomorrow, if that  
4       were to happen.

5           It's all just speculative. It's certainly not our  
6       intention to announce a superseder next week or next month.  
7       And as we sit here today, I am not able to say that we are  
8       certainly, or even likely, to add charges in this case. This  
9       is all speculation, and it need not delay moving the case  
10      forward.

11           THE COURT: All right. Mr. Adams, at some point, the  
12       government needs to get real and stop speculating here. This  
13       case is moving forward, and I'm certainly not going to hold  
14       anything up for the government to get its act together and  
15       decide what it wants to do.

16           Here is what I am going to order: I'm going to give  
17       the parties 30 days to talk about -- and you should just assume  
18       that the existing superseding indictment is the operative  
19       charging document in this case. If the government tries to  
20       alter that, we'll have to deal with it at that time. I would  
21       like the parties to confer about the proposed trial groupings  
22       that the government proposed in advance of the November  
23       conference, and I would like you to confer about a schedule for  
24       the disclosure by defendants of their experts, assuming the  
25       existing indictment is the one on which we're moving forward.

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1 And I would like to get a report back from the parties in  
2 30 days. Hopefully, it could be a joint report, but to the  
3 extent there are disagreements, those should be laid out in the  
4 letter.

5 So there's no misunderstanding, it is the Court's view  
6 that at least one of these three trial groupings ought to be in  
7 a position to proceed to trial during this calendar year. I  
8 don't know, because I don't have a crystal ball, but I am  
9 assuming that with all of the new CDC guidelines that are  
10 coming out or lifting of in-place guidelines, that we may, at  
11 some point, sooner rather than later, be moving back towards  
12 normal courthouse operations and individual judges' scheduling  
13 of their own trials. As you know, right now, I do not have  
14 control over the ability to set a trial. Whether I set the  
15 trial date or it's set through central scheduling, it is my  
16 intention that the first of these trials will be requested for  
17 a slot in the fourth quarter of this calendar year, with the  
18 others to follow soon thereafter in 2022. I'm putting everyone  
19 on notice of that right now. And I will look for a report from  
20 you all with respect to trial grouping and disclosure of  
21 experts in the next 30 days. We will include a date, concrete  
22 date, in the order.

23 Is there any other matter that we should talk about?

24 MR. KREISS: Respectfully, your Honor, may I address  
25 the Court?

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1                   THE COURT: Who's speaking, please?

2                   MR. KREISS: Jason Kreiss, I apologize, on behalf of  
3 Mr. Navarro.

4                   Respectfully, your Honor, would the Court permit the  
5 defendants an opportunity to submit a letter based upon the  
6 Court's addressing and the comments made by the Court in  
7 reference to our letter of recusal, please?

8                   THE COURT: No. You have my ruling. I don't know --  
9 sir, you don't practice in New York, right?

10                  MR. KREISS: Not regularly, your Honor, correct.

11                  THE COURT: In New York, it's not our practice to file  
12 letters commenting on an opinion or a ruling by the Court.  
13 That's not the way we operate or the way the court system  
14 operates.

15                  So, as I said, 30 days from today, you should conclude  
16 your meet-and-confer, and I will look for a report from the  
17 parties on proposed trial groupings and disclosure of experts.

18                  I suppose we should look at a date in the early fall  
19 for a further conference, then, to talk about that. I will  
20 include a date for a further conference sometime in early  
21 September. I need to confer with my courtroom deputy about  
22 calendaring, but we'll include that. If there are issues with  
23 the date that we propose, the parties can confer, and then  
24 we'll try to work with you to find a date that works.

25                  MS. GLAVIN: Your Honor?

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1                   THE COURT: Yes.

2                   MS. GLAVIN: This is Ms. Glavin.

3                   Before we conclude the conference, could some of the  
4 defense lawyers just have a moment to confer offline just to  
5 see if there's any other issues? There are a couple of things  
6 I'd like to discuss, just before we conclude, with my  
7 colleagues.

8                   THE COURT: You can, but I don't honestly know how to  
9 facilitate that on Team.

10                  MS. GLAVIN: No, no, no, your Honor, if we go on  
11 mute -- I can initiate a phone call.

12                  THE COURT: Oh. I have no objection to that.

13                  MS. GLAVIN: Can we take a ten-minute break or  
14 five-minute break?

15                  THE COURT: Why don't we reconvene at 12:10. I will  
16 turn off my camera and mute my line, you can all talk, and I  
17 will log back on at 12:10.

18                  MS. GLAVIN: Thank you, your Honor.

19                  (Recess)

20                  THE COURT: This is Judge Vyskocil. We're back on the  
21 record.

22                  Is the court reporter with us?

23                  (Pause)

24                  THE COURT: All right, terrific. Thank you.

25                  So, when you requested leave to consult, I said that I

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wanted a status or a letter from the parties roughly 30 days out reacting to or telling me the proposal with respect to trial grouping and a proposal for disclosure of defendants' experts, and that we would have a further conference sometime in September.

So, are there other matters that we should discuss?

All right. Mr. Adams, is there a further application from the government under the Speedy Trial Act?

MR. ADAMS: There is, your Honor. In light of the motions schedule that the Court has set, we would ask to exclude time for purposes of considering those motions, and for the Court to consider them as well, through September 9th, which is the reply date.

THE COURT: All right. I'm going to set a further conference, as I said, sometime in September. I would suggest that just to leave me time to look at my calendar, we use September 15th as a control date.

Is that acceptable to the government?

MR. ADAMS: It is, your Honor. And we would just ask to extend the exclusion through September 15th for that purpose.

THE COURT: That's what I'm suggesting.

MR. ADAMS: Yes. Thank you, your Honor.

THE COURT: All right. And do you want to make a record of the reasons justifying exclusion of time?

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1                   MR. ADAMS: Yes. The interests of justice are  
2 furthered, to give the defendants, as they've requested,  
3 additional time to review discovery, contemplate and file  
4 motions, and for the government to respond to those, and for  
5 the Court to begin reviewing those motions as well.

6                   THE COURT: Are there any objections from any  
7 defendant?

8                   All right. Hearing none, I will exclude time between  
9 today and September 15th. I do find that the ends of justice  
10 served by excluding the time outweigh the interests of the  
11 defendants and the public in a speedy trial. Specifically, the  
12 exclusion of time will allow the defendants to complete their  
13 review of discovery, to consider and prepare and file any  
14 further motions that they wish to make, specifically the  
15 second-round motions to suppress that we've been talking about,  
16 it will allow for the government to file oppositions,  
17 defendants to file any replies, and for the Court to consider  
18 those motions.

19                   Is there anything --

20                   MR. FELDMAN: Your Honor.

21                   THE COURT: -- further for the record?

22                   MR. FELDMAN: Your Honor -- I'm sorry, your Honor.  
23 It's Andrew Feldman, on behalf of Dr. Fishman.

24                   To the extent that there are not motions pending  
25 during the period of exclusion, which your Honor is talking

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about, which would be automatically tolled under the Speedy Trial Act, Dr. Fishman is objecting to the exclusion of time under the Speedy Trial Act and is not waiving his rights to a speedy trial.

THE COURT: All right. Understood. But the objection is overruled in light of the request from the defendants themselves for more time to consider whether to file motions.

Anyone else wish to be heard on any issue?

All right. Then I thank our court reporter, Mr. Walker, very much for being with us and for your patience. I wish everyone a good rest of the day, and please, everyone, stay safe and healthy.

Enjoy the nice weather.

COUNSEL: Thank you, Judge.

\* \* \*